IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

No. 79

JAMES C. DAVIS, Director General and Agent (Norfolk-Southern Railroad),

Petitioner,

v.

JOHN L. ROPER LUMBER COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF

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October, 1925.

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1. The case of Barrett v. Van Pelt (April 13, 1925), 45 Sup. Ct. 437, relied upon by respondent, is not determinative of the case at bar.

Respondent's reliance, in its brief, is chiefly upon the recent United States Supreme Court decision in the case of *Barrett, President of Adams Express Co.*, v. *Van Pelt* (No. 160, October Term, 1924), argued January 6, 1925, decided April 13, 1925, and reported in 45 Sup. Ct. at page 437.

While this decision embodies dicta apparently contrary to petitioner's position in the case at bar, a care-

ful examination will show that it is not determinative of this case. In the *Van Pelt* case the court went further in its expressions than the language of the Cummins proviso required, when the opinion entered into a discussion of negligence outside of the matter of delay. It is true that in restating the language of the proviso to conform to the court's construction the word "damaged" was changed so as to read "damage", and the comma after the word "unloaded" was omitted. But this was merely incident to the discussion in support of the conclusion that negligence was necessary to make the delay a damage for which recovery might be had without filing claim within the bill of lading limit. That argument is not necessarily applicable to the case at bar. The *Van Pelt* case was a delay in transit case, and this case is a misdelivery case. The sole question involved is whether there can be a recovery for misdelivery without filing claim. The court did not so hold in the *Van Pelt* case.

Even in the light of the Cummins proviso as restated by the court, filing of claim is not excused as a condition of recovery for misdelivery. A *fortiori* is such filing of claim not excused under the language of the Cummins proviso as written, rather than as restated in aid of its interpretation in the *Van Pelt* case. That restatement was as follows:

> "Provided, however, that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded or damage in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

The language of the statute is as follows:

> "Provided, however, that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery." (24 Stat. 386, 34 Stat. 595, 38 Stat. 1196, 39 Stat. 441. 8 U. S. Comp. Stat. page 9291, section 8604.)

The question before the court in the *Van Pelt* case was that of delay. The court construed the Cummins proviso as requiring carelessness or negligence as a cause of the delay in order that the carrier might be liable without notice of claim. The court also held that the burden was on the shipper to prove that carelessness or negligence existed.

We submit that filing of claim was not excused in the case at bar because the loss was not due to delay or damage while the shipment was being loaded or unloaded, nor due to damage in transit by carelessness or negligence. The loss was due solely to misdelivery. If Congress had intended to excuse filing of claim in order to recover for misdelivery, the statute should and would have so declared. The court cannot write into the statute such an additional provision. In the *Van Pelt* case the court emphasizes the thought that the intention of Congress must govern, and that the letter of the statute must yield to the intent. It would be a forced construction to say that Congress intended to include misdelivery in a proviso dealing with delay or damage during loading or unloading or damage in

transit. If misdelivery is not included, then notice of claim must be given within the bill of lading limit as a condition of recovery. Misdelivery is not within the proviso, and therefore notice was necessary, independent of the question of negligence. If Congress had intended to include such loss among those for which notice could not be required, it would have used more apt and definite language as an evidence of such intent.

Moreover, the *Van Pelt* case was plainly a case of loss or damage in transit. It was an express company case, and we have pointed out in our opening brief that in the case of express companies transit extends to the point of delivery to consignee at his place of business, because an express company so delivers while a railway carrier does not.

In one respect the *Van Pelt* decision goes even further in our support than the position that we have taken in the previous stages of this litigation. In holding that negligence is a necessary element in a shipper's recovery, it requires very strong express proof of such negligence, and holds that same may not be inferred from facts which would ordinarily make a prima facie case. It held that proof that an express shipment made at Louisville on February 23rd, going through to Pittsburgh without transfer and delivered on March 4th at New York presented a situation as to which negligence might not be inferred, although the ordinary time of a passenger train between Louisville and New York was 25 or 26 hours.

In the light of that rule the mere misdelivery of the shipment in the case at bar, without surrender of the bill of lading, does not establish that carelessness or

negligence existed. There might be facts or circumstances connected with the delivery without surrender of the bill of lading which would relieve the carrier from any inference of negligence. To meet the burden of proof shipper must show something more than the fact of delivery without surrender of the bill. The facts agreed do not affirmatively show negligence, and, since the burden is on the shipper, and notice was not given, a recovery cannot be had.

2. The other authorities relied upon by respondent fail to support a recovery without seasonable filing of claim.

Most of the arguments and authorities have been so fully developed in the courts below that in our opening brief in this case we have anticipated and met most of respondent's contentions. Therefore, in this reply brief, it is sufficient to make reference to previous discussions, with some brief additions to what we have said in our opening brief.

At the top of page 5 of respondent's brief our citation of the *Blish Milling Company* case is summarily dismissed with the statement that it ante-dates the Cummins Amendment. By reference to page 21 of our opening brief it will be seen that we stated that very fact in citing that case; and it will further be seen that the case supports the point for which we cite it.

At the bottom of page 5 of respondent's brief the doctrine of stoppage *in transitu* is invoked as an answer to our contention that delivery is not a part of transit. We have already answered this contention by quoting at page 17 of our opening brief from the case of *Amory*

Mfg. Co. v. *Gulf &c. R. Co.*, 37 S. W. 856. The expression "*in transitu*", familiar in connection with the doctrine of stoppage *in transitu*, furnishes no useful parallel to aid us in the solution of the problem at issue here. It is pertinent to repeat here just three sentences from the opinion in the case just mentioned,—

> " '*In transitu*' means literally in course of passing from point to point, and such is its common acceptation. Such, also, is the literal meaning of the phrase '*in transitu*' but, for the sake of convenience in defining the right of a creditor to stop goods which have been sold but not delivered to an insolvent purchaser, they have been given a broader technical signification. It may be doubted whether the phrase is ever used in our language in any other connection."

We concede that the term "transportation" covers delivery as well as transit, so that the carrier liability extends even for 48 hours after notice of arrival, as is stated on page 6 of respondent's brief. It is true that during such period *transportation* had not been completed. But on the other hand *transit* had been. The notice proviso deals with "transit", not "transportation."

At the middle of the same page of respondent's brief there is a quotation from the Commerce Act defining "transportation." As we pointed out at page 23 of our opening brief, this very statutory definition itself classifies "transit" as a subdivision of "transportation," as will appear in the bold face portion of respondent's quotation from the Act.

It is true that in the *Shuart* case, cited by respondent at the bottom of page 6 of its brief, "*transportation* was still in progress" when the animals were injured at destination before delivery. But *transit* had been completed. At the bottom of page 7 of its brief respondent invokes the case of *Brown* v. *Western Union Tel. Co.* (S. C.) 67 S. E. 146, and asks, "What is the difference between the telegraph message in the hands of the telegraph boy and the shipment of freight in the hands of the railway agent at destination?" The question is easily answered. The duty of a telegraph company, like that of an express company (which we have heretofore discussed in connection with the *Gillette* case), is to deliver at the residence or office of addressee; so that here again we have no useful parallel. Moreover, most states have special acts governing the handling of telegraph messages, and this South Carolina case turned upon such a local act. That delivery and transmission or transit are placed in separate categories under the law of Virginia may readily be seen by a glance at the following sections of the Code of Virginia: 4042, which covers transmission, and 4043, which covers delivery.

In our opening brief at page 25 we have already commented on the Virginia case of *Jennings* v. *Virginian Railway*, 119 S. E. 147, cited by respondent on page 8 of its brief.

On page 33 of our opening brief we have discussed the point as to which respondent cites on page 9 of its brief the cases of *N. Y. P. & N. R. Co.* v. *Peninsula Produce Exchange*, 240 U. S. 34, and *Norfolk Truckers Exchange* v. *Norfolk Southern R. Co.*, 116 Va. 466.

At pages 19 and 20, respectively, of our opening brief we have discussed the *Haley* and *Gillette* cases, found on page 100 of respondent's brief; and the *Morrell* case, found on pages 12 and 13, is dealt with in our opening brief at page 24. At pages 21 and 24 of our opening brief we have treated the North Carolina cases of *Mann* v. *Fairfield* and *Winstead* v. *Railway Co.*, cited in respondent's brief at pages 13 and 14, respectively.

The case of *Scott* v. *American Railway Rxpress Company*, 189 N. C. 377, is cited for the first time in this litigation at page 14 of respondent's brief. Like the *Gillette* case and others relied on by respondent, the *Scott* case was an express company case. We have already shown that "transit" covers a larger field in the case of express companies than in the case of railway carriers.

3. The liability imposed by Section 10 of the Bills of Lading Act does not affect the requirement of claim as a condition precedent to recovery under Section 20 of the Interstate Commerce Act.

The contention made at page 14 et seq. of respondent's brief that the Pomerene Bills of Lading Act establishes liability in this case, independently of the provisions of the Interstate Commerce Act, was a new comer in the Supreme Court of Appeals of Virginia, the point not having been raised in the trial court. This contention is tantamount to saying that the Pomerene Act repeals the Cummins Amendment, but it is obvious from the entire context of both acts that

they are to be read and construed together, and that neither repeals the other. The Cummins Amendment provides for the issuance of bills of lading on interstate shipments, and the Pomerene Act deals primarily with the form of bills of lading and the methods of issuance and use of same. It is true that Section 10 of the Pomerene Act is declaratory of the common law rule imposing liability for misdelivery of order notify shipments. Said section declares a rule of liability, and the last clauses of Section 20 of the Interstate Commerce Act relate to recovery on such liability. In other words the Cummins Amendment is in the nature of a limitation, affecting the remedy rather than the right, and so is in harmony with the Pomerene Act. It expressly speaks of the requirement of notice and filing of claim "as a condition precedent to recovery."

The Bills of Lading Act merely creates a liability in cases coming within its terms. But, in order to recover under that Act, claim must be filed as required in the bill of lading and authorized in the Cummins Amendment. Therefore, the Bills of Lading Act does not affect the question of the necessity for filing claim.

4. The judgment of the Supreme Court of Appeals of Virginia should be reversed.

Respectfully submitted,

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October, 1925.